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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 02-136
FM Broadcast Stations	)	RM-10458
(Arlington, The Dalles, Moro, Fossil, Astoria,	)	RM-10663
Gladstone, Portland, Tillamook,	)	RM-10667
Springfield-Eugene, Coos Bay, Manzanita	)	RM-10668
and Hermiston, Oregon, and	)	
Covington, Trout Lake, Shoreline, Bellingham,	)	
Forks, Hoquiam, Aberdeen, Walla Walla,	)	
Kent, College Place, Long Beach and	)	
Ilwaco, Washington)	)	

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DEC 15 2004

Federal Communications Commission
Office of Secretary

To: Office of the Secretary
Attn: The Commission

OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon and First Broadcasting Investment Partners, LLC ("First Broadcasting") (collectively, "Joint Parties"), by their respective counsel, and pursuant to Section 1.115(d) of the rules of the Federal Communications Commission ("Commission"), hereby oppose the Motion for Leave to Supplement ("Motion") filed in the above-captioned proceeding on December 1, 2004 by Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey"). In its Motion, Triple Bogey asks the Commission to apply retroactively a new aural service backfill policy asserted by the Media Bureau ("Bureau") almost five months after the Report and Order was issued in this proceeding.[1] As further discussed below: (i) Triple

[1] *See Amendment of Section 73.202(b) FM Table of Allotments, FM Broadcast Stations (Sells, Arizona)*, Report and Order, MB Docket No. 02-376, DA 04-3514 (rel. Nov. 22, 2004) ("*Sells*").

Bogey's Motion is procedurally defective; (ii) retroactive application of the Bureau's new backfill policy to a rule making petition that already has been granted is inconsistent with existing Commission precedent; and (iii) the new policy should be reconsidered by the Commission. For any or all of these reasons, Triple Bogey's Motion to supplement its pending Application for Review should be denied.

I. TRIPLE BOGEY'S SUPPLEMENT IS LATE-FILED AND EXCEEDS PAGE LMITS

Triple Bogey's Motion should be denied because it was filed well beyond the deadline for submitting supplemental materials in support of its Application for Review. Section 5(4) of the Communications Act permits any person aggrieved by any action of a delegated authority to file an application for review within the time and in such manner as the Commission may prescribe.[2] The Commission's rules require that an application for review and any supplemental thereto must be filed within 30 days of public notice of the action taken pursuant to delegated authority for which review is sought.[3] The Bureau order (DA 04-2054) ("*KMCQ Order*") that is the subject of Triple Bogey's pending Application for Review was released on July 9, 2004,[4] and was published in the Federal Register on July 21, 2004.[5] Thus, any supplemental filing to Triple Bogey's Application for Review was due on August 20, 2004, yet Triple Bogey's Motion and supplemental material was submitted to the Commission nearly four months after that date.

The Bureau issues FM allotment decisions on a weekly basis. Triple Bogey should not be permitted to restate and reframe its arguments in newly filed pleadings each time the Bureau

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[2] *See* 47 U.S.C. § 155(4).

[3] *See* 47 C.F.R. § 1.115(d). For documents in notice and comment rule making proceedings the term public notice means the date the document is published in the Federal Register. *See* 47 C.F.R. § 1.4(b)(1).

[4] *See* Report and Order, 19 FCC Rcd 12803 (2004) ("*KMCQ Order*").

[5] *See* 69 Fed. Reg. 43534 (July 21, 2004).

issues a new FM allotment order that Triple Bogey believes bolsters its Application for Review. Permitting such a tactic would circumvent well-established Commission pleading cycles and, in light of the many months an allotment proceeding can extend, creates an excessive and undue administrative burden for the Commission and its staff. Accordingly, consistent with long-standing precedent,[6] the Commission should reject Triple Bogey's supplemental filing on the ground that it was filed out of time.

Triple Bogey's supplement suffers from an additional fatal defect, because it exceeds the page limitation set forth in the Commission's Rules. Section 1.115(f) requires that an application for review may not exceed 25 pages. Triple Bogey's application for review was exactly 25 pages long, and if the additional arguments in its supplement were considered, it would exceed that limit by at least two pages. Therefore, the Commission should refuse to consider any additional legal argument that Triple Bogey may advance beyond its initial filing. *See AT&T Corp. Emergency Petition*, 19 FCC Rcd 9993 at ¶ 20 and n.50 (2004).

II. THE *SELLS* DECISION SHOULD NOT BE APPLIED RETROACTIVELY

Even if the Commission ultimately chooses to uphold the novel aural service backfill policy first articulated by the Bureau less than a month ago in the *Sells* decision, the policy should not be retroactively applied to previously decided proceedings. For more than a decade, Commission policy expressly has condoned the use of vacant allotments by petitioners in FM allotment rule makings to fill white and gray areas.[7] Applying this longstanding policy, the

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[6] *See, e.g., Applications of Great Western Cellular Partners, L.L.C.*, Memorandum Opinion and Order, 17 FCC Rcd 8508, ¶ 1 (2002) (late-filed "amendment" to application for review not considered as part of the record of proceeding).

[7] *See, e.g., Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580, 6584 n. 30 (1991) (replacing with vacant allotments aural service lost in the relocation of WHMA from Anniston to Sandy Springs); *see also Caliente, Nevada, et al.*, DA 04-2146 (rel. Sept. 3, 2004) (using a vacant allotment to backfill a gray area).

Bureau in its *KMCQ Order* found no white area as a result of the Joint Parties' proposal. *See KMCQ Order* at ¶ 21. It determined that Mid-Columbia's proposal was superior to all mutually exclusive counterproposals under the Section 307(b) allotment priorities. The Bureau's apparent decision in *Sells* to reverse its longstanding policy to permit the use of vacant allotments to fill white and gray areas—a decision reached nearly five months after the Bureau's issuance of the *KMCQ Order*—should not be retroactively applied to overturn the *KMCQ Order*.

As stated in Triple Bogey's Motion, in crafting its novel aural service backfill policy in *Sells*, the Bureau cites the new transmission service backfill policy adopted by the Commission in its *Refugio* decisions.[8] However, Triple Bogey conveniently fails to acknowledge that in both *Refugio I* and, on reconsideration, in *Refugio II* the Commission expressly instructed the Media Bureau only to apply the Commission's new transmission service backfill policy prospectively and not to apply the new policy to previously decided rule makings. Specifically, the Commission stated in *Refugio I*: "*Henceforth*, a community of license modification proponent may not rely on a new 'backfill' FM allotment to 'preserve' a community's sole local transmission service."[9] The Commission affirmed this holding in *Refugio II* stating, "[W]e have determined that the public interest is best served by modifying our 'backfill' policy in resolving all *pending* change of community of license rule making proposals."[10] In making this determination in *Refugio II*, the Commission cited approvingly to the Bureau's *Barnwell* decision,[11] which *expressly* refused to apply *Refugio I* retroactively.

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[8] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pacific Broadcasting of Missouri LLC)*, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003) ("*Refugio I*"), *recon. den.* 19 FCC Rcd 10950 (2004) ("*Refugio II*").

[9] *Refugio I* at ¶ 15 (emphasis added).

[10] *Refugio II* at ¶ 15 (emphasis added and citation omitted).

[11] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Barnwell, South Carolina et al.)*, Memorandum Opinion and Order, 18 FCC Rcd 15152 (M.B. 2003) ("*Barnwell*").

In *Barnwell*, the Bureau denied a petition for reconsideration of an FM allotment decision that was issued prior to the Commission's adoption of *Refugio I,* even though the Bureau concluded that the allotment decision was contrary to the Commission's mandate in *Refugio I.* According to the Bureau:

> In view of the fact that the reallotment . . . is not final, [Petitioner] contends that this Commission directive requires that we reverse our action . . . . We disagree. The Commission action in [Refugio] only instructed the staff to cease the "backfill" practice on a going-forward basis. Under this policy, the staff will not grant any currently pending rule making petition that requires a vacant allotment "backfill" to preserve local service. The Commission, however, did not instruct the staff to set aside prior actions. This going-forward approach best accommodates the needs of the listeners and the need of licensees for an orderly administrative process.[12]

Thus, the Commission's affirmative citation to *Barnwell* in *Refugio II* conclusively demonstrates that the Commission did not intend for the Bureau to apply *Refugio* retroactively. Inasmuch as the Bureau's *Sells* decision purports to be based on *Refugio I,* the Commission's prohibition against retroactive application of *Refugio I* must apply equally to the novel aural service backfill policy asserted by the Bureau in *Sells.*

The instant proceeding effectively shares the same procedural status as the *Barnwell* decision—an initial decision was issued in both proceedings under the then existing backfill policy and the policy was reversed during the pendency of an administrative appeal of the initial decision. Consequently, if the Commission ultimately determines to adopt the Bureau's *Sells* backfill policy, then, as in the administrative appeal in *Barnwell,* in the instant proceeding the

[12] *Barnwell* at ¶ 8.

Commission also should apply the backfill policy in effect when the Bureau rendered its initial decision, rather than retroactively applying a new policy.[13]

Moreover, there are strong policy reasons weighing against retroactive application of *Sells* to the instant proceeding. The Commission previously has recognized that unsuccessful parties to rule making proceedings have an incentive to file petitions for reconsideration or applications for review to delay the finality of adverse initial decisions.[14] Such appeals would create needless administrative burdens that would tax the Commission's already stretched resources and would cause regulatory uncertainty to adversely effect the ability of companies to make business decisions. By insisting upon the finality of settled cases, the Commission deters this kind of misuse or abuse of its processes.

III. THE COMMISSION SHOULD RECONSIDER THE AURAL SERVICE BACKFILL POLICY ASSERTED BY THE BUREAU IN *SELLS*

In *Sells*,[15] the Bureau denied an FM allotment counterproposal that would have removed the sole aural reception service to an area containing 2,846 people, even though two new allotments had been proposed that would have provided service to the white area. In denying the counterproposal, the Audio Division asserted a new aural service backfill policy based on the Commission's *Refugio* decisions, which held that there is a presumptive need to continue existing transmission services to residents of a community. Specifically, the Bureau concluded in *Sells* that "[v]acant allotments cannot be used to avoid loss of first or second reception

[13] Because the *Sells* decision is subject to reconsideration and may not be upheld, the Commission should be particularly hesitant to apply the policy retroactively to overturn the Bureau's previous determination in the instant proceeding.

[14] *See Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501 (1996) (concluding that automatic stay had encouraged numerous meritless reconsiderations).

[15] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Sells, Arizona)*, Report and Order, M.B. Docket No. 02-376, RM 10617 (M.B. rel. Nov. 22, 2004) ("*Sells*").

service" resulting in unserved areas of significant size.[16] Although the objectives intended to be achieved by the Bureau in *Sells* are laudable, the potential ramifications of the new aural service backfill policy announced in the decision pose concern. Accordingly, the *Sells* policy warrants full Commission review and an opportunity for public comment before its widespread application by the Bureau.

The Joint Parties acknowledge the importance to the public interest of the availability of reception service to all Americans. Preserving first and second aural reception services has always been the Commission's first and second highest priority in FM allotment proceedings, and justifiably so. However, before adopting a new policy aimed at bolstering first and second reception service, the Commission should carefully weigh any potentially adverse effects of the new policy. The new *Sells* policy may have significant and far reaching ramifications on future FM allotment proceedings:

- By asserting a new backfill policy that effectively prevents petitioners from relying on vacant allotments or unconstructed permits to avoid white and gray areas,[17] the Bureau has created a distinction between a vacant allotment in existence prior to the initiation of a rule making proceeding and a vacant channel allotted in the context of the rule making proceeding. In effect, this causes a dramatically different application of the Commission's first and second allotment priorities depending on whether the vacant channel at issue was allotted the day before a rule making proposal was filed or was proposed in the rule making proposal. It is not clear whether a public interest determination under Section 307(b) should not turn on seemingly arbitrary issues of timing.

- By significantly increasing the circumstances under which allotment priorities one and two will be triggered by preventing proposals from utilizing vacant allotments to backfill

[16] *Sells* at ¶ 7.

[17] Under the Commission's longstanding policy expressed in *Greenup,*[17] a vacant allotment is treated as providing service for the purpose of determining whether a given FM allotment rule making proposal creates unserved or underserved white or gray areas. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991). If a vacant allotment would "serve" a geographic region once built out, the region is not considered unserved for purposes of applying the Commission's allotment priorities even if a rule making proposal would remove the only other aural service reaching the region. Thus, the existence of a vacant allotment effectively prevents the creation of white area and thereby prevents the Commission's first allotment priority from being implicated.

white and gray areas, the *Sells* policy may significantly increase the amount of existing white area and reduce the ability of broadcast radio licensees to upgrade their stations to ensure that they are making the best and highest use of their spectrum resources.

- If *Sells* signals an intention by the Bureau to generally consider actual operating station coverage when determining white and gray areas and in gain and loss computations, rather than imputed service coverage based on maximum facilities as is generally the current practice, a wholesale change in gain and loss calculation procedures will be required. If vacant allotments are no longer counted for white area purposes, as *Sells* holds, then the Commission's longstanding procedures for computing gain and loss areas are called into question because the same methodology is used to determine white areas and loss areas. This could call into question the technical showings in all pending rule makings.[18]

- Until the *Sells* policy is further fleshed out through additional decisions or a rule making, the extent of the policy is not clear. For example, it is not clear whether the policy permits a proposal to fill a white area using an existing vacant allotment by upgrading it in class or modifying its reference coordinates. It also is not clear how unbuilt construction permits will be treated when determining white and gray areas.

For these reasons, the Joint Parties believe that the Bureau's newly asserted aural transmission backfill policy should not effectively be affirmed and adopted by the Commission in the context of the instant proceeding. Rather, in the interest of developing a full and complete record with respect to the matter, such a policy should be adopted by the full Commission[19] in the context of its review of *Sells* or in some other context that permits interested parties to participate in the Commission's consideration of the matter. The Joint Parties fully recognize that the Commission may decide to reform the existing aural service backfill policy in order to

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[18] For example, New Northwest's counterproposal in this proceeding relied on vacant allotments to replace lost service due to its relocation of a station from one community to another. *See KMCQ Order* at ¶ 16 (making new allotments to Manzanita, Oregon and Ilwaco, Washington).

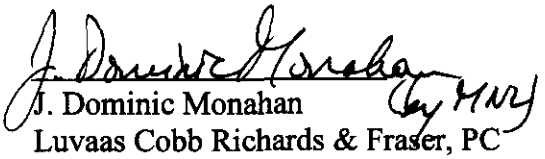
[19] While the Commission previously has ruled that its "policy is to accept rule making proposals requesting a change in the community of license of the sole local service licensed to a community only upon the initiation of broadcast operations by a replacement [*transmission*] service," it has never reached the question of whether vacant allotments can or cannot be used to replace *reception* service. *Refugio II* at ¶ 14. In fact, in *Refugio II*, the Commission expressly declined to address this particular issue and announced that it would resolve the question in a future proceeding. *See id.* at n. 48. If the Bureau's *Sells* backfill policy is a natural outgrowth of the *Refugio* backfill policy, the Commission could have stated as much in *Refugio II*, but instead expressly chose not to do so. Further, the Commission has not ruled on this question to date. *See also* 47 C.F.R. § 0.283(c) (requiring the Bureau to refer to the Commission en banc "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.").

ensure access by as many people as possible to reception service. However, it should do so in a more considered way than the instant narrow proceeding.

WHEREFORE, for any or all of the foregoing reasons, the Commission should deny the Motion of Triple Bogey to supplement the record with the *Sells* decision, and it should not apply the *Sells* aural service backfill policy in the instant proceeding.

Respectfully submitted,

MID-COLUMBIA BROADCASTING, INC.

By: 
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December 15, 2004

CERTIFICATE OF SERVICE

I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 15th day of December, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Opposition to Motion to Supplement" to the following:

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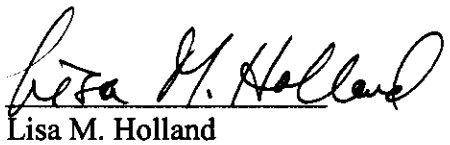

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